



December 27, 1999

Mr. Jay Garrett
City Attorney
City of Greenville
P.O. Box 1049
Greenville, Texas 75403-1049

OR99-3768

Dear Mr. Garrett:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#130569.

The Greenville Police Department (the "department") received a request for "[a]ny and all complaints, whether written or verbal, filed against any officer of this law enforcement agency within the past [five] years," including "any public information about how that complaint was investigated and the results of the investigation." You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted sample documents.¹

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You represent that some of the documents at issue are maintained by the department under section 143.089(g) of the Local Government Code.

¹We assume that the "sample" records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 143.089 of the Local Government Code contemplates two different types of personnel files, one that the city's police department is required to maintain as part of the police officer's civil service file, and one that the city's police department may maintain for its own internal use. Local Gov't Code § 143.089(a), (g).

Section 143.089(g) reads as follows:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director [of the civil-service commission] or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Subsection (g) authorizes city police and fire departments to maintain for their own use a file on a police officer or fire fighter that is separate from the file maintained by the city civil service commission. "The department may not release any information contained in the department file to any agency or person," but instead "the department shall refer to the director [of the civil-service commission] or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file."² Local Gov't Code § 143.089(g); see *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 952 (Tex. App.--Austin, 1993, writ denied).

The court in *City of San Antonio* addressed the availability of information that is contained in the department's internal file pursuant to section 143.089(g). The court determined that section 143.089(g) makes confidential any records kept in a department's internal file. *City of San Antonio v. Texas Attorney Gen.*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied) (in construing section 143.089, court found general legislative policy that allegations of misconduct against police officers and fire fighters not be subject to compelled disclosure unless they have been substantiated and resulted in disciplinary action). We are unable to determine whether the documents you submitted to this office for review are part of the file maintained by the department under section 143.089(g). Consequently, if the requested records are maintained only within the section 143.089(g) file, the records are confidential and may not be disclosed. However, if the documents submitted to this office are not part of the department's section 143.089(g) file, they are not excepted from disclosure under section 552.101 of the Government Code. Therefore, we will address your arguments for any documents not maintained in the department's 143.089(g) file.

²We rely on your statement that you have complied with the procedural requirements of section 143.089(g) by referring the requestor to the civil service director at the time the request was made.

You state that portions of the requested documents containing criminal history record information ("CHRI") are excepted from disclosure under section 552.101. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. See 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; see also *id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, any responsive documents containing CHRI obtained from DPS or another criminal justice agency must not be released to the requestor. We have reviewed the information you have marked as CHRI and agree that this information must be withheld under section 552.101.

You have also submitted confidential medical records for our review. The Medical Practice Act (the "MPA") protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Occ. Code § 159.002(b). We have marked the documents that are medical records subject to the MPA. See Open Records Decision No. 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). These documents may be released only in accordance with the MPA. Open Records Decision No. 598 (1991). See Occ. Code § § 159.002(c), 159.004, 159.005.

You also argue that the release of the requested information violates your officers' privacy rights. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Public Information Act. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *Id.* Therefore, information must be withheld from the public when (1) it is highly intimate and embarrassing such that

its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

The requested information pertains solely to the work behavior and job performance of the department's police officers, and as such cannot be deemed outside the realm of public interest. *See* Open Records Decision Nos. 484 (1987) (public's interest in knowing how police departments resolve complaints against police officer ordinarily outweighs officer's privacy interest), 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 329 (1982) (reasons for employee's resignation are not ordinarily excepted by constitutional or common law privacy). Furthermore, false light privacy is not an actionable tort in Texas. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). Therefore, a governmental body may not withhold information from disclosure merely because its release might place a person in a false light. *See* Open Records Decision No. 579 (1990). Thus, the department's complaint files may not be withheld in their entirety based on a right of privacy. We note, however, that some of the information at issue implicates a third party's privacy rights. *See* Open Records Decision Nos. 422 (1984) (fact that a person attempted suicide is private), 343 (1982) (information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress is private). We have marked the information that must be withheld under section 552.101 in conjunction with the common-law right to privacy.

Additionally, you contend that portions of the requested documents may be withheld under section 552.108. Section 552.108 of the Government Code states that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure "if release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). We note, however, that where no criminal investigation or prosecution results from a police department's internal investigation of a police officer for alleged misconduct, section 552.108 is inapplicable to the internal investigation documents. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. Civ. App.--El Paso 1992, writ denied); Open Records Decision No. 350 (1982). Here, the police department's internal investigations did not result in the criminal investigation or prosecution of the officers at issue. Thus, the internal investigative documents may not be withheld under section 552.108. You have also submitted offense reports which appear to be the underlying bases for the internal investigations. You do not explain whether these reports relate to ongoing investigations or prosecutions so as to demonstrate that their release would interfere with the detection, investigation, or prosecution of crime. Furthermore, you have not demonstrated that the submitted offense reports relate to criminal investigations that *concluded in results* other than

convictions or deferred adjudications. See Gov't Code § 552.108(a)(2), (b)(2). Therefore, the department may not withhold the requested information under section 552.108.³

You also indicate that portions of the responsive information are protected under section 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. It does not appear from the face of the documents, nor have you adequately explained, how the marked information relates to the policymaking functions of the department. Therefore, the department may not withhold the marked information under section 552.111.

You also state that the submitted documents contain information that is protected from disclosure under section 552.117(2). Section 552.117(2) of the Government Code excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members. We have reviewed the information for which the department has asserted section 552.117 as an exception, and agree that that information must be withheld under section 552.117. We have marked additional information that must also be withheld under 552.117.

The documents also contain social security numbers that are not protected from disclosure under section 552.117(2). Nevertheless, these social security numbers may be confidential under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). See Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See *id.* You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the department to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(vii)(I). We caution, however, that section 552.353 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, you should ensure that the number was not obtained or maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

³You state that the submitted records contain the results of polygraph examinations. We note that Texas law prohibits the public disclosure of polygraph examination results. Occ. Code § 1703.306. You did not mark, nor did we discern, any information protected under this statute. However, to the extent that polygraph results exist within the responsive records, those results must be withheld under section 552.101.

We also note that the submitted documents contain photographic images that are protected from disclosure under section 552.119(a). Section 552.119(a) of the Government Code excepts from required public disclosure “a photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure,” with certain exceptions that do not appear relevant here. A photograph that depicts a peace officer may be released only if the peace officer gives written consent to the disclosure. Gov’t Code § 552.119(b). We note that in Open Records Decision 502 (1988), this office held that there need not be a threshold determination that release of a photograph would endanger an officer before the statutory predecessor to section 552.119(a) could be invoked. Consequently, unless the officers have given their written consent or are no longer living, the department must withhold their photographic images from public disclosure under section 552.119. Open Records Decision No. 536 (1989) (provision which protects police officer’s photograph ceases to apply after death of officer).

Finally, we note that the submitted documents contain information that is excepted from disclosure under section 552.130. Section 552.130, which governs the release and use of information obtained from motor vehicle records, provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov’t Code § 552.130. This office has determined that Texas drivers’ license numbers, license plate numbers, and vehicle identification numbers are categories of information that are excepted from disclosure under section 552.130. We have marked, for your convenience, some of the information protected by section 552.130. We note, however, that the department has submitted traffic citations which appear to have been filed with a court. Documents filed in a court are considered public and must be released. *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992). On the other hand, if the citations have not been filed with the court, the department must withhold the Texas driver’s licenses and license plate numbers from the submitted citations pursuant to section 552.130. Except as noted above, the remaining requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "June B. Harden".

June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref: ID#130569

Encl. Submitted documents

cc: Ms. Becky Oliver
Fox 4 News
400 North Griffin Street
Dallas, Texas 75202
(w/o enclosures)